

**STATE OF INDIANA  
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

**IN THE MATTER OF  
THE PERMIT OF**

**MAC'S CONVENIENT STORE  
706 NORTHWESTERN HIGHWAY  
WEST LAFAYETTE, INDIANA 47906**

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**PERMIT NO. 79-21223**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. BACKGROUND OF THE CASE**

Permittee, Mac's Convenience Stores LLC d/b/a Circle K, Store #2240, 706 Northwestern Highway, West Lafayette, Indiana 47906 (sometimes referred to as the "Applicant" or "Store 2240") is the Applicant for type 115 Alcohol and Tobacco Commission ("ATC") permit #DL79-21223.<sup>1</sup> On or about July 21, 2004, Applicant filed its application, which was assigned to the Tippecanoe County Local Alcoholic Beverage Board ("LB") for hearing. The LB heard the application request on October 13, 2004, and on that same day, voted 4-0 to deny the application.<sup>2</sup> The LB did not indicate its reasons for denial on the voting sheet (Exhibit "A").<sup>3</sup> The LB transcript indicated that the basis for the denial appeared to be whether a "gas station" may hold a grocer's permit and whether there was community need. The Applicant filed a timely Notice of Appeal and the matter was assigned to ATC Hearing Judge U-Jung Choe. The matter was set for hearing on July 20, 2005, and at that time, witnesses were sworn,

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<sup>1</sup> Beer and wine (grocery) permit located in an incorporated area.

<sup>2</sup> Although the voting sheet (Exhibit "A" at the ATC hearing) indicated that the vote was 4-0, the transcription admitted as evidence at the A TC hearing as Exhibit "B" disclosed that an unidentified LB board member did not vote (ATC hearing). Also, Mr. Mark Kesmodel, an employee of the Applicant who attended the LB hearing, testified at the ATC hearing that at least one member of the LB did not participate in the vote. As such, the vote should be reflected as 3-0 against.

<sup>3</sup> Reference to exhibits are those introduced at the ATC hearing and are incorporated herein by reference.

evidence was heard, and matters were taken under advisement. The Applicant was represented by Michael J. Nader, Baker & Daniels LLP, Fort Wayne. There were no remonstrators of record before the Hearing Judge in this matter.

## **II. EVIDENCE BEFORE THE LOCAL BOARD**

A. The following individual testified before the LB in favor of the Applicant in this cause:

1. Mark Kesmodel.

B. The following individual testified before the LB against the Applicant:

1. Dan St. John.

C. The following exhibits were introduced before the LB in favor of the Applicant:

None.

D. The following exhibits were introduced before the LB against the Applicant:

None.

## **III. EVIDENCE BEFORE THE ATC**

A. The following individuals testified before the ATC in favor of the Applicant in this cause:

1. Mark Kesmodel. Mr. Kesmodel testified that he is the area manager for the Applicant and has responsibilities over Store 2240. Mr. Kesmodel, having reviewed Exhibit "C," further testified that this Exhibit reflected a list of 27 stores owned by Applicant that currently maintain a beer/wine permit. Mr. Kesmodel further testified that in April of 2005, a 28th store located in Allen County, Indiana was awarded a beer/wine permit. Mr. Kesmodel further testified that all 28 stores were substantially the same size and sold substantially the same goods, and that all maintained a type 115 grocery permit. Mr. Kesmodel further testified that Applicant Store 2240 was similar in size, but somewhat smaller, and sold grocery items similar

to the other 28 stores maintaining a beer/wine permit. Mr. Kesmodel testified that these stores, including Store 2240, sold typical grocery items including milk, chips, snacks, bread, and other items typically sold by grocery stores. Mr. Kesmodel further testified that he did not believe that any aspect of Store 2240 would make it any less likely to be a grocery store than the other 28 locations that maintain grocery permits in the State of Indiana.

Mr. Kesmodel next testified as to the security and training undertaken by the Applicant's chain of stores. Mr. Kesmodel stated that the following security and training mechanisms were in place at all 28 stores:

- a. We Card Training;
- b. Cash register safeguards that require a cashier to enter the date of birth of any individual purchasing beer/wine; and
- c. Security cameras, which monitor and record the actions and transactions of customers and cashiers, and also record verbal conversations.

The above precautions already have been or will be effectuated for Store 2240.

Mr. Kesmodel stated that the security camera recordings are reviewed daily by store management and security officers of the Applicant to ensure that all personnel are adhering to the Applicant's training and procedural requirements. In addition, each store that maintains a liquor license requires its employees to undergo alcohol awareness management for further education. As of the date of this ATC hearing, none of the 28 locations with permits had been cited by the ATC for a single alcohol violation.

2. Troy Robinette, Assistant Store Manager of Store 2240. Mr. Robinette testified that he personally surveyed residents living within approximately one mile of Store 2240. Mr. Robinette testified that he did not provide any financial incentive or other favor to induce a

survey participant into indicating that they were in favor of the permit or to deter them from indicating their disfavor. He testified that Exhibit "D" accurately reflects the results of the survey. The results of the survey indicate that 19 of 31 participants stated that they were in favor of the beer/wine permit for Store 2240, reflecting a 61.3% approval percentage.

Mr. Robinette also testified that an in-store survey was used by placing a survey form near the cash register at Store 2240. This survey remained at the cash register during normal business hours and no personnel encouraged or discouraged individuals from signing the survey. Again, no financial incentive or free product was used to entice a customer to vote. Mr. Robinette stated that each sheet was numbered sequentially and that no sheet was destroyed or modified by Applicant personnel. Mr. Robinette further testified that Exhibit "E" reflected all survey results. Exhibit "E" reflects that 196 of 222 participants (97%) were in favor of Store 2240 selling beer/wine. Mr. Robinette testified that he could not ascertain with any certainty as to where the survey participants resided, but felt that many were nearby residents, either because they walked to the location, or because their mannerisms suggested they resided nearby.

3. Michael J. Nader, Baker & Daniels LLP, attorney for Applicant. Mr. Nader introduced evidence regarding the LB remonstrator, Dan St. John. Mr. Nader first noted that Dan St. John signed in as a remonstrator at the LB hearing, but did not legibly indicate his business. Rather, Mr. St. John wrote and then scribbled out what appeared to be "Villa," followed by another name (Exhibit "G"). Mr. St. John listed his street address as 2309 Happy Hollow (Exhibit "G"). The president of the Village Bottle Shoppes is Dan St. John, as reflected on the four permits introduced as Exhibit "F." The minutes of the April 7, 2004 meeting of the Common Council of the City of West Lafayette, Indiana, reflected a witness who introduced himself as one Dan St. John, residing at 2309 Happy Hollow, and

the owner of four Village Bottle Shoppes stores in West Lafayette (Exhibit "H," p. 14).

The evidence introduced at the ATC hearing demonstrated that Dan St. John was, in fact, the owner of the four would-be competing liquor stores located within a three-mile distance of Store 2240.

B. The following exhibits were introduced and admitted before the ATC in favor of the Applicant:

1. Exhibit A: Local Board Vote;
2. Exhibit B: Affidavit of Susan Martin, with transcription of LB Hearing attached;
3. Exhibit C: A list of the 27 store permits held by Mac's Convenience Stores in the State of Indiana;
4. Exhibit D: External Survey of Area Residents;
5. Exhibit E: In-Store Survey of Store 2240 customers;
6. Exhibit F: Copies of the four licenses of Village Bottle Shoppes located in West Lafayette, Indiana;
7. Exhibit G: List of Remonstrators from the LB Hearing; and
8. Exhibit H: Minutes of the Common Council meeting, dated April 7, 2004, for the City of West Lafayette.

C. Remonstrators testifying against Applicant at ATC:

None.

D. The following exhibits were introduced and admitted before the ATC in support of the Remonstrator:

None.

#### **IV. FINDINGS OF FACT**

1. The Applicant, Mac's Convenience Stores LLC, d/b/a Circle K Store #2240, 706

Northwestern Highway, is an applicant for a type 115 Alcohol and Tobacco Commission (“ATC”) permit, #DL79-21223 (LB Hearing; ATC file).

2. The Applicant sells milk and other dairy products, soup, bread, eggs, cereal, soda, snacks and other items customarily found in a grocery store (LB Hearing; ATC Hearing).

3. As of the date of the ATC hearing, there existed in West Lafayette, Indiana, a total of 14 available type 115 grocer permits (ATC Records).

4. The Commission has determined 28 other Mac’s Convenience Store, each of which is substantially similar to Store 2240, to be grocery stores pursuant to Indiana law (ATC Records; ATC Hearing; Exhibit “C”).

5. The Applicant has not had any alcohol violations regarding any of its 28 existing licenses (ATC Hearing).

6. The Applicant’s employees are extensively trained to avoid issued regarding the sale of alcoholic beverages to underage persons, receiving We Card Program and technical alcohol management training (LB Hearing; ATC Hearing).

7. The Applicant employs a number of security devices to secure the premises and avoid the unauthorized sale of alcohol, including cameras, management review of security tapes, and cash registers that require a customer’s age to be entered before alcohol may be purchased.

8. Applicant’s employment policies provide for termination of employment for a violation of any alcoholic beverage law or procedure.

9. Dan St. John appeared as a sole remonstrator at the LB Hearing. Mr. St. John objected to the issuance of a permit based upon the assertion that Applicant was a gas station and the community did not want it (Exhibit “B”).

10. Mr. St. John indicated at the LB Hearing that he was a concerned citizen (LB Official

transcript), but did not indicate his business on the remonstrator sign-in sheet (Exhibit G). Mr. St. John is the owner off our Village Liquor, Inc. d/b/a Village Bottle Shoppes located within approximately three miles of the Applicant's place of business (See Exhibits F, G and H).

11. Would-be competition between the Applicant and an existing package liquor location played a role in the remonstrator at the LB hearing.

12. There are four other liquor stores within a three-mile distance of Store 2240 (Exhibit “F”).

13. The Commission may grant or refuse the application accordingly as it deems the public interest will be served best.

14. No evidence was presented at the LB hearing or the ATC hearing to show there was not sufficient need or desire in the community to justify granting the permit.

15. A survey of residents indicated that residents desire the permit (Exhibit “D” and “E”).

16. The ATC has the responsibility to regulate alcoholic beverages in a manner consistent with the desires of local communities.

17. Any conclusion of law may be considered a finding of fact if the context so warrants.

## **V. CONCLUSIONS OF LAW**

1. The permittee/Applicant, Mac’s Convenience Stores LLC, d/b/a Circle K Store #2240, 706 Northwestern Highway, is an applicant for a type 115 Alcohol and Tobacco Commission (“ATC”) permit, #DL79-21223 (LB Hearing; ATC file).

2. Applicant is of good moral character and of good repute in each community in which it does business and is qualified to hold the permits it seeks. I.C. 7.1-3-4-2(a)(2)(A).

3. Applicant meets the qualifications to hold a permit pursuant to I.C.7.1-3-5-2.

4. The ATC may consider both need and desire for determining whether a permit should be

issued in a particular matter. 905 I.A.C. 1-27-4.

5. Need means whether the services are available at the location or in some close geographic proximity. 905 I.A.C. 1-27-4(a).

6. Desire means whether individuals would purchase those products at the subject location if they were available. 905 IAC 1-27-4(b).

7. A determination of whether there exists a need and desire for the services of the location in question turns on the facts of each case.

8. Where an Applicant shows customers would be willing to purchase alcoholic beverages if they are available for sale, such evidence demonstrates a desire to receive such services at that location. 905 I.A.C. 1-27-4(b).

9. Where the Applicant shows competing stores are located in close proximity to the proposed premises and sell alcohol, such evidence demonstrates a desire to purchase the product. *Id.*

10. The LB should not deny a permit to an otherwise qualified permittee based solely on evidence submitted by a competing permittee. *Wine and Spirits Wholesaler of Indiana, Inc. v. Indiana Alcoholic Beverage Commission*, 556 N.E.2d 17 (Ind. App. 1990). Mr. St. John's testimony at the LB hearing, which is part of the administrative record on appeal, should not be considered compelling given his economic motivation for opposing the permit. *Id.*

11. Competition between permittees is not a valid reason for denying the permit. Reasonable competition between permittees results in better products being delivered, better services being offered, diverse shopping environments, lower prices to consumers, and is good public policy. Reasonable competition helps protect and promote economic welfare and is not inconsistent with the Commission's purpose of, *inter alia*, regulating and limiting the manufacture, sale,

possession and use of alcoholic beverages. IC 7.1-1-1.

12. The LB's recommendation is clearly erroneous if there is a lack of substantial evidence which supports it. IC 7.1-3-19-11.

13. To deny Applicant 's application while granting other similarly situated applicants' applications would be arbitrary and capricious and otherwise not in accordance with the law. *Id.*

14. The Commission may decline to follow the recommendation of the LB where the recommendation is not based on substantial evidence. *Id.*

15. The Commission may reverse the LB's action in denying the application for a permit if it finds that the LB's decision was (a) arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; or (d) without observation of procedure required by law, or unsupported by substantial evidence.

16. The LB's action in denying the application of a permit in this matter was (a) arbitrary, capricious, and abusive, discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observation of procedure required by law; and/or (e) unsupported by substantial evidence.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the LB in denying the application for Permit #DL 79-21223 was not based on evidence and cannot be sustained. It is further ordered, adjudged and decreed that the evidence introduced at the ATC hearing was in favor the Applicant, Mac's Convenience Stores LLC, Store 2240, and against the recommendations of the LB. The appeal of Applicant, Mac's Convenience Stores d/b/a Circle K,

Store #2240 for a type 115 Alcohol and Tobacco Commission permit is granted, the recommendation of the LB in this matter is reversed, and the Permit #DL79-21223 applied for herein is GRANTED.

DATED: \_\_\_\_\_

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U-Jung Choe, Hearing Judge